



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
1595 WYNKOOP STREET
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

SEP 27 2007

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Robert Burke, President
Burke Oil Company Inc.
d/b/a Presho Oil Company
1200 East King Street
Chamberlain, SD 57325

Re: In the Matter of Burke Oil Co., Chamberlain Bulk Plant Facility;
In the Matter of Burke Oil Co., d/b/a Presho Oil Co., Presho Oil
Facility, Docket Nos. CWA-08-2007- 0025; CWA-08-2007-0026
Administrative Complaints and Notice of Opportunity
for Hearing

Dear Mr. Burke:

Enclosed please find copies of two Administrative Complaints and Notice of Opportunity for Hearing (complaints) issued by the U.S. Environmental Protection Agency (EPA) pursuant to its authority under section 311(b)(6)(B) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6)(B). The complaints are based on alleged violations of the oil pollution prevention regulations set forth at 40 C.F.R. part 112 at the Chamberlain Bulk Plant Facility owned and operated by Burke Oil Company Inc., and at the Presho Oil Facility owned by Burke Oil Company Inc. doing business as Presho Oil Company.

Specifically, the complaints allege that Burke Oil Company Inc. failed to prepare and implement a Spill Prevention, Control and Countermeasures (SPCC) plan for the Chamberlain Bulk Plant and Presho Oil facilities in accordance with 40 C.F.R. §§ 112.7 and 112.8 as required by 40 C.F.R. § 112.3. EPA discovered the violations during inspections of the facilities conducted in September 2006. The complaints propose penalties of \$19,273 for the Chamberlain Bulk Plant facility and \$34,948 for the Presho Oil facility. The total proposed penalty is \$54,221. Please note that EPA currently is exercising its discretion in not citing Burke Oil Company Inc. for SPCC noncompliance at the Wheat Growers Association facility located at 34373 2491/2 Street in Chamberlain, South Dakota, based on the understanding that four of the five tanks will be relocated to the Chamberlain Bulk Plant facility by October 15, 2007, and that the remaining tank will be located inside a diked area of sufficient containment capacity. EPA reserves the right to proceed with enforcement against the Burke Oil Wheat Growers Association facility if the work is not performed in a satisfactory or timely manner.

EPA also opted not to cite the Chamberlain Bulk Plant facility for noncompliance with the security regulation set forth at 40 C.F.R. § 112.7(g)(1), requiring that handling, processing, or storage facilities be fully fenced and locked and/or guarded at the entrance when the facility is not in production or is unattended. EPA based its decision on your representation that the facility is patrolled regularly in lieu of being secured by fence. However, in order for patrolling to serve as a functional equivalent to fencing for purposes of satisfying 40 C.F.R. § 112.7(g)(1), a written record of a regular patrol schedule must be maintained for the facility. This information was not available at the time of inspection.

Burke Oil Company Inc. has the right to a hearing to contest the factual allegations in the complaints. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the complaints. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an answer set forth in 40 C.F.R. §§ 22.15 and 22.38. If you wish to contest the allegations or the penalties proposed in the complaints, you must file a written answer within thirty (30) days of receipt of the enclosed complaints with the EPA Regional Hearing Clerk at the following address:

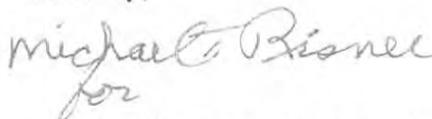
Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

If you do not file an answer by the applicable deadline, you will have defaulted and each allegation in the complaints will be deemed to be admitted as true. You will have waived your right to appear in these actions for any purpose and will also have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the complaints are legally sufficient, EPA may file a motion for default for the amounts proposed in the complaints.

Whether or not you request a hearing, you may confer informally with EPA concerning the alleged violations or the proposed penalty amounts. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing your answer and/or requesting a hearing.

If you have any questions, the most knowledgeable people on my staff regarding this matter are Amy Swanson and Donna Inman. Ms. Swanson is in our Legal Enforcement Program and can be reached at (303) 312-6906. Ms. Inman is in our UIC-FIFRA-OPA Technical Enforcement Program and can be reached at (303) 312-6201.

Sincerely,

Handwritten signature of Michael Bisone in cursive script.

Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2007 SEP 27 PM 1:53

IN THE MATTER OF:)	Docket No. CWA-08-2007-0025
)	
Burke Oil Company Inc.)	ADMINISTRATIVE COMPLAINT AND
d/b/a Presho Oil Company)	OPPORTUNITY TO REQUEST HEARING
1200 East King Street)	
Chamberlain, SD 57325-2103)	
)	
(Presho Oil Facility)	
500 East Highway 16)	
Presho, SD))	Proceeding to Assess Class II Civil Penalty
)	Under Section 311 of the Clean Water Act
Respondent.)	

AUTHORITY

1. This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency (EPA) by section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990. The Administrator has properly delegated this authority to the undersigned EPA official. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules) set forth at 40 C.F.R. part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

2. Respondent Burke Oil Company Inc. (Respondent), doing business as Presho Oil Company, is a corporation organized under the laws of South Dakota and authorized to do business in South Dakota.

3. Respondent is a “person” within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

4. Respondent owns and operates a wholesale fuel business facility located at 500 East Highway 16, Presho, South Dakota (facility), within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§ 1321(a)(6) and (10).

5. The facility includes, but is not limited to, one 14,000 gallon tank containing gasoline; three 12,600 gallon tanks containing diesel; one 5,500 gallon tank containing diesel; two 2,000 gallon tanks containing diesel, and diesel and gasoline; one 500 gallon tank containing kerosene; and one 265 gallon tank containing used oil. A 265 gallon tank of unknown product also is at the facility. The total oil storage capacity at the facility is approximately 62,065 gallons. In addition, 825 gallons of miscellaneous oil is stored in drums inside a storage building at the facility.

6. Gasoline, diesel, used oil, and kerosene are all oil within the meaning of “oil” as defined at section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

7. Respondent stores, transfers, distributes, uses or consumes oil or oil products at the facility.

8. Respondent is an “owner and operator” of an “onshore facility” within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§ 1321(a)(6) and (10).

9. The facility is a “non-transportation related” “onshore facility” within the meaning of 40 C.F.R. § 112.2.

10. Drainage from the facility would flow along a ditch east southeast approximately 1/3 of a mile, into an unnamed tributary for approximately ¼ mile before flowing into Medicine Creek, then into the Missouri River.

11. The unnamed tributary, Medicine Creek, and the Missouri River are “navigable waters” and “waters of the United States” within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1.

12. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil ... from vessels and from onshore and offshore facilities, and to contain such discharges"

13. EPA promulgated the oil pollution prevention regulations, set forth at 40 C.F.R. part 112. 40 C.F.R. § 112.1(b) states that the requirements of part 112 apply

“to owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, and which, due to its location, could reasonably be expected to discharge oil in quantities that may be harmful, as described in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines”

14. The facility is a non-transportation onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1) or its adjoining shoreline in quantities that may be harmful by either (1) violating applicable water quality standards or (2) causing a film or sheen or a discoloration of the surface water or adjoining shorelines or causing a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

15. The facility is subject to the oil pollution prevention requirements of 40 C.F.R. part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations.

16. 40 C.F.R. § 112.3 requires that owners or operators of onshore facilities prepare a Spill Prevention, Control, and Countermeasures (SPCC) plan in writing in accordance with applicable sections of part 112, including but not limited to, sections 112.7 and 112.8.

17. Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), states in pertinent part that any owner, operator, or person in charge of any vessel, onshore facility or offshore facility who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I civil penalty by ... the Administrator.

18. On or about September 12, 2006, EPA conducted an unannounced SPCC inspection (inspection) at the facility with the consent of facility representative Jim Kotz.

19. The following SPCC measures were found to be deficient at the facility at the time of the inspection and remain deficient as of the date of this complaint:

- a. No secondary containment for the loading/unloading rack in accordance with 40 C.F.R. §112.7(h)(1);
- b. No secondary containment for the two 2,000 gallon tanks (tank nos. 13, 15), the 500 gallon tank (tank no.14), a 265 gallon tank (tank no. 12), and the 15 drums of oil located inside the storage building in accordance with 40 C.F.R. §112.7(c) and 112.8(c)(2);
- c. Inadequate secondary containment for bulk tank nos. 1 through 6 in accordance with 40 C.F.R. §112.8(c)(2);
- d. No physical barrier or signage at loading rack to prevent vehicle departure before completing disconnect of the transfer lines while fueling vehicles in accordance with 40 C.F.R. §112.7(h)(2);
- e. Facility does not have fencing in accordance with 40 C.F.R. §112.7(g)(1);
- f. Undiked drainage not contained in accordance with 40 C.F.R. § 112.8(b)(3);
- g. Failure to maintain written documentation of inspections in accordance with 40 C.F.R. §112.7(e);
- h. Visible discharges of oil not promptly corrected and/or removed in accordance with 40 C.F.R. §112.8(c)(10);
- i. Failure to lock master flow and drain valves in accordance with 40 C.F.R. § 112.7(g)(2);
- j. Failure to have properly designed pipe supports in accordance with 40 C.F.R. § 112.8(d)(3);

- k. Failure to maintain written documentation of training and/or annual briefings in accordance with 40 C.F.R. § 112.7(f)(1) and (f)(3); and
- l. Spill reports failed to contain required information in accordance with 40 C.F.R. §112.7(a)(4);

20. The Facility SPCC plan was reviewed and found to be inadequate as follows:

- a. Failure to include inside oil storage containers, and includes nonexistent tanks, in SPCC plan diagram and narrative in accordance with 40 C.F.R. 112.7(a)(3)(i).

21. The Respondent failed to prepare and implement an SPCC plan for the facility in accordance with the regulations at 40 C.F.R. § 112.7 and 112.8 as required by 40 C.F.R. § 112.3.

22. Respondent's failure to prepare and implement an SPCC plan in accordance with the regulations at 40 C.F.R. §§ 112.7 and 112.8 from September 2006 through and including September 2007, a duration of approximately twelve (12) months, constitutes violations of 40 C.F.R. § 112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

PROPOSED PENALTY

As alleged in the preceding paragraphs, and pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. §1321(b)(6)(B)(ii), and 40 C.F.R. § 19.4, the Respondent is liable for civil penalties of up to \$11,000 per day for each day during which the violation continues, up to a maximum total of \$157,500 for all violations. Complainant proposes the assessment of administrative penalties against the Respondent in the amount of **\$34,948**. Complainant proposes this penalty amount after considering the applicable statutory penalty factors in section 311(b)(8) of the Act, 33 U.S.C. §1321(b)(8): the seriousness of the violations, the economic benefit to the violator resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the

economic impact of the penalty on the violator, and any other factors as justice may require. Specifically, the proposed penalty amount is based on Respondent's major non-compliance and moderate environmental impact for a duration of at least twelve (12) months. No additions were made to the proposed penalty amount based on either a history of violations or economic benefit.

TERMS OF PAYMENT FOR QUICK RESOLUTION

If Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18. If such payment is made within thirty (30) calendar days of receipt of this Complaint, no Answer need be filed. For more time for payment, Respondent may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. The payment shall be made by remitting a cashier's or certified check, including the name and docket number of the case, referencing "Oil Spill Liability Trust Fund-311," for the amount, payable to the : "**Environmental Protection Agency,**" to:

**US checks by regular
US postal service mail:**

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

**Federal Express, Airborne,
Or other commercial carrier:**

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Wire transfers:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045

Field Tag 4200 of the Fedwire message should read “D
68010727 Environmental Protection Agency “

On Line Payment:

WWW.PAY.GOV

Enter sfo 1.1 in the search field

Open form and complete required fields.

A copy of the check or wire transfer shall be simultaneously sent to:

Donna K. Inman (8ENF-U)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Payment of the penalty in this manner does not relieve Respondent of its obligation to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in the Act, you have the right to a public hearing to contest this Complaint. If you (1) contest the factual claims made in this Complaint; (2) contest the appropriateness of the proposed penalty; and/or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with sections 22.15 and 22.38 of the Consolidated Rules within thirty (30) calendar days after receipt of this Complaint. Your Answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which you have knowledge; (2) state circumstances or arguments which are alleged to constitute grounds for defense; (3) state the facts you dispute; (4) the basis for opposing the proposed relief; and (5) specifically request an administrative hearing, if desired. Failure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation.

The Answer and one copy must be sent to:

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

and a copy must be sent to the following attorney:

Amy Swanson, Enforcement Attorney (8ENF-L)
U.S. EPA Region 8, Legal Enforcement Program
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: (303) 312-6906

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED PENALTY WITHIN THE THIRTY (30) CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 CFR §22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

PUBLIC NOTICE

Pursuant to section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), the Complainant is providing public notice of and reasonable opportunity to comment on this proposed issuance of a complaint assessing administrative penalties against you. If a hearing is held on this matter, members of the public who submitted timely comments on this proceeding have the right under section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), to be heard and present evidence at the hearing.

SETTLEMENT CONFERENCE

The EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations and is willing to explore

this possibility in an informal settlement conference. If you or your attorney, if you choose to be represented by one, have any questions or wish to have an informal settlement conference with EPA, please call Senior Enforcement Attorney Amy Swanson at (303) 312-6906. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in the Consolidated Rules. If a settlement can be reached, its terms must be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the Regional Judicial Officer.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**
Complainant.

Date:

9/27/07

for Michael T. Bisnev
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the ADMINISTRATIVE COMPLAINT AND OPPORTUNITY TO REQUEST HEARING was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that a true copy of the same was sent via certified mail to:

Robert Burke, President
Burke Oil Company Inc.
d/b/a Presho Oil Company
1200 East King Street
Chamberlain, SD 57325-2103

9/27/07
Date

Judith McTernan
Judith McTernan